APPENDIX A

No. 17920

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

W. Willard Wirtz, Secretary of Labor, *Plaintiff-Appellant,* v. Local Union No. 705, Hotel and Restaurant Employees and Bartenders Union, AFL-CIO, *Defendant-Appellee.*	Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided February 14, 1968.

OPINION

Filed February 14, 1968

Before Weick, Chief Judge, and Phillips and Celebrezze, Circuit Judges.

Phillips, Circuit Judge. The Secretary of Labor filed a complaint to set aside a union election on the ground that qualification standards of candidates for office had not been enforced with uniformity. The action was initiated under Title IV, §402, of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. §482. The purpose of Title IV is "to insure free and democratic union elections." *Wirtz v. Local Union 125, Laborers' International Union,* — U.S. —, 36 U.S.L.W. 4118, 4119 (No. 58 Jan. 15, 1968).

The election was conducted July 20, 1965. Myra Wolfgang was secretary-treasurer of the local union. Godfrey Franklin undertook to qualify as a candidate for vice president in opposition to an incumbent favored by Wolfgang. In order to qualify as a candidate, a member must have been in continuous good standing for twenty-four months prior to his nomination. The union by-laws provide that a member who is more than two months in arrears in payment of dues will be automatically suspended. The election committee of the local union advised Franklin that he did not qualify as a candidate because he had been more than two months in arrears.

Franklin thereupon sent a telegram to the election committee, care of Myra Wolfgang, dated June 15, 1965, protesting the decision that he was ineligible to run for office because not in continuous good standing. The election committee replied by informing Franklin that he had a right of appeal to the General President of the International Union.

On June 22, 1965, Franklin directed an appeal to the General President of the International Union. The appeal is attached as an appendix to this opinion.

Myra Wolfgang wrote a detailed letter to the International President contending that Franklin was ineligible to be a candidate because he had been in arrears in payment of dues for two calendar months.

Franklin's protest was overruled by the President of the International Union on July 9, 1965. He thereupon appealed to the General Executive Board of the International Union[1] and this appeal was denied.

An investigation thereupon was made by the Department of Labor, with notice to both the International Union and Local Union that one of the grounds of complaint was that "candidate qualifications were not uniformly applied." The International President informed the Area Director of the Department that "Nothing further will be done by this of-

[1] Myra Wolfgang was a member of the General Executive Board. She and the General President were recorded as "not voting" on Franklin's appeal to the Board.

fice, unless and until we are fully advised with much greater particularity of the circumstances and details concerning the alleged violations."

The complaint filed by the Secretary of Labor in this proceeding alleges that the union violated Section 401(e) of the Act, 29 U.S.C. §481(e), in the conduct of the election. The alleged violation consisted of allowing Myra Wolfgang to run as a candidate for secretary-treasurer, despite the fact that she failed to fulfill the "two years continuous good standing" eligibility requirement, while this same requirement was applied to disqualify other candidates similarly situated. The complaint further alleges that the union altered its dues records so as to conceal the facts disqualifying secretary-treasurer Wolfgang.[2]

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[2] The complaint contained the following averments:

"IV

"The defendant, purporting to act in accordance with its constitution and bylaws, conducted an election of officers on July 20, 1965. This election was subject to the provisions of Title IV of the Act (29 U.S.C. 481, *et seq.*).

"V.

"On June 15, 1965, Godfrey Franklin, a member in good standing of defendant, filed a protest of the conduct of the said election, in accordance with the constitution and bylaws of defendant and of the Hotel and Restaurant Workers and Bartenders International Union, AFL-CIO (hereinafter the International). On October 12, 1965, the General Secretary-Treasurer of the International notified him that his protest was denied. Having then fully exhausted the remedies available under the constitution and bylaws of the defendant and the International, without obtaining relief, he filed a complaint with the Secretary of Labor, on October 26, 1965, within the time specified in Section 402(a)(1) of the Act (29 U.S.C. 482 (a)(1)), alleging violations of the provision of Section 401 of the Act (29 U.S.C. 481) on the part of defendant in the conduct of the protested election.

"VI

"Pursuant to Section 402(b) of the Act (29 U.S.C. 482(b)) the Secretary of Labor investigated the said complaint and as a result of the facts shown by said investigation found probable cause to believe that

(Continued on next page)

The union filed a motion to dismiss the complaint on the ground that Frankin's protest was directed only to the office of vice president and contained no charge concerning the disqualification of Myra Wolfgang for the office of secretary-treasurer. The union argues that Franklin's complaint to the union did not give notice of the charges which are the subject matter of the Secretary's complaint, thereby depriving the union of an opportunity to investigate the charges concerning Myra Wolfgang's qualifications. It is the union's position that the Secretary has no right to maintain this action because the statute requires that the remedies available under the constitution and by-laws of the union first must be exhausted. 29 U.S.C. §482(a)(1).

Initially the District Julge denied the motion to dismiss, rendering an opinion which we find to be well-reasoned and sound. Thereafter the decision was announced in *Wirtz v. Local Unions, Nos. 9, 9A and 9-B, International Union of Operating Engineers,* 366 F.2d 911 (10th Cir.).[3] Upon the

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(*Continued from preceding page*)

violations of Title IV of the Act (29 U.S.C. 481, *et seq.*) on the part of defendant had occurred in the conduct of said election and had not been remedied prior to the filing of this action.

"VII

"In the said election, defendant permitted Myra Wolfgang to run as a candidate for Secretary-Treasurer, and declared her as having been elected, although she was then not qualified to be a candidate for, and to hold, office under the eligibility requirements of applicable provisions of the constitution and bylaws of the defendant and of the International; to wit, the requirement to have maintained good standing for a period of two years. The said requirement was at the same time applied to other candidates. The union altered its due records or permitted the records to be altered so as to conceal the facts disqualifying Myra Wolfgang. Defendant thereby violated Section 401(e) of the Act (29 (U.S.C. 481(c)).

"The violations of Section 401 of the Act (29 U.S.C. 481), found and alleged as above, may have affected the outcome of the election."

[3] Certiorari was granted and this decision was vacated for mootness. 387 U.S. 96. The Secretary's brief states that after the Solicitor General filed a petition for certiorari, the parties filed a joint suggestion of mootness, on the ground that the case had been settled in an agreement calling for a supervised election of all officers.

authority of this opinion the District Court vacated its previous order and granted the union's motion to dismiss the complaint for failure to exhaust internal union remedies. We reverse on authority of *Wirtz v. Local Union 125, Laborer's International Union, supra,* in which the Supreme Court held that in a suit by the Secretary of Labor under Section 402 of the Labor Management Reporting and Disclosure Act of 1959, the Secretary is not limited to the specific allegations made in the union member's initial complaint.

The essence of Franklin's internal complaint was that "although he paid his dues like everyone else, he was the only one disqualified." Although he alleged discrimination as between himself and the incumbent vice president, he also involved secretary-treasurer Wolfgang in his allegations, charging that the incumbent vice president was "her favored candidate" and that the real reason for his own disqualification was not the dues requirement, but the fact that he accepted the nomination "contrary to the wishes of secretary-treasurer Wolfgang." The burden of Franklin's internal complaint was that the dues requirement was being utilized in a discriminatory manner by the incumbent officers, including Myra Wolfgang, to stifle opposition.

Lacking the investigatory authority of the Secretary of Labor, Franklin could not have been expected to discover the fact later charged by the Secretary—that the union altered the dues records of Wolfgang to conceal her ineligibility to run for office under the same rule that had been used to disqualify Franklin.

The union's defense to this litigation is that Franklin's internal complaint failed to allege nonpayment of dues by Wolfgang, a fact which the union itself actively concealed. We find this defense to be untenable.

We hold that under the averments of the complaint in this case the action may be maintained by the Secretary attacking the legality of the election of the union's secretary-treasurer and other officers, even though the union member who exhausted internal remedies before the suit

was filed was a candidate for vice president. We further hold that the internal complaint filed by Godfrey Franklin in this case was adequate to give the union an opportunity to correct the violation and that the complaint is sufficient to aver exhaustion of internal union remedies in compliance with the statute. 29 U.S.C. §482(a).

The order dismissing the complaint is reversed and the case is remanded to the District Court for trial.

APPENDIX

June 22, 1965
3111 Oakman Boulevard
Detroit 39, Michigan

Mr. Ed S. Miller
General President
Hotel and Restaurant Employees and
Bartenders International Union
6 East Fourth Street
Cincinnati, Ohio 45202

Dear Mr. Miller:

I herewith appeal from the decision of the Election Committee of Local 705 that I am ineligible to run for the office of Local Vice-President of the Local Union at the pending elections, to which office I was duly nominated at the Local's convention of June 7, 1965. (My protest from such declaration of ineligibility was rejected, with direction that, if I wish, I appeal directly to you.)

The purported reason I have been declared ineligible is my alleged violation of the provisions of Article XII, Sec. 6 of the International Constitution, respecting arrearage of dues, and the provisions of Article VI, Sec. 1 of Local 705's by-laws, respecting eligibility for candidacy. The Election Committee's letter of June 9, 1965, declaring my ineligibility, is herewith enclosed.

The conclusion of the Election Committee is clearly erroneous. I have never been advised of any such infraction, nor been suspended, fined, or otherwise disciplined with respect thereto, nor been asked to pay any fee or other penalty as a condition of reinstatement; nor has the Local ever advised you, as would otherwise be its obligation under Article X, Sec. 21 of the International's Constitution, of any suspension of myself; nor has it withheld any per capita from you based upon any alleged cessation or suspension of my membership. Indeed, if Article XII, Sec. 6 of the International Constitution stands applicable, the Local itself is suspended for failure to remit to you fees otherwise alleged owing. Until now, the Local has consistently accepted my dues and that of others when tendered, has waived the purported construction of this section and its application, and is estopped to assert it now. My dues book will attest to fully paid dues without suspension at all times, as receipted by Secretary-Treasurer Wolfgang.

The purported reason for my declared ineligility is a sham and crude subterfuge. The real reason is that, contrary to the wishes of Secretary-Treasurer Wolfgang, I accepted nomination for the office of Vice-President in opposition to her favored candidate, incumbent Vice-President Furay—whose own circumstances relative to the alleged dues provisions have, in fact, been no different from my own. This discriminatory abuse of my rights as a member of the Local and International violates the provisions of the Labor Management Reporting and Disclosure Act of 1959, including Sections 401(c), 401(e) and 609, and the Constitution and by-laws of the International and Local, respectively.

In addition to the foregoing, on June 10, 1965, I was discharged as a business agent of the Local Union, also for exercising my rights as a member to participate in election procedures of the Local Union and to stand for office. The pretext given was "insubordination". I hereby appeal from the Local 705 Executive Board's ratification of that discharge, which action was taken in violation of Section 609 of the Labor Management Reporting and Dis-

closure Act of 1959, and the provisions of the International's Constitution and Local by-laws.

I take this appeal not merely to exhaust my internal remedies preliminary to the institution of appropriate action, if necessary, by myself and/or the Secretary of Labor, but in the sincere hope that the International will not tolerate this flagrant abuse of its members' rights to enjoy internal union democracy. These matters are already a source of public notoriety in Detroit, to our mutual regret. I hope you will immediately review and reverse these actions, particularly so as to afford reasonable time for me to effectively campaign prior to the election, which is now scheduled for July 20. I further request, pursuant to Section 401 of the Labor Management Reporting and Disclosure Act, that I be afforded equal treatment with all other candidates with respect to the circulation of campaign material, access to union records, and the assurance of adequate safeguards to insure a fair election, including the presence of an observer in my behalf at the polls and at the counting of ballots.

I await your prompt reply.

Yours very truly,

/s/ Godfrey Franklin
GODFREY FRANKLIN

ENCLOSURE:

cc: Local 705
Hotel, Motel & Restaurant Employees' Union
100 Selden Avenue
Detroit, Michigan

APPENDIX B

ORDER DENYING PETITION FOR REHEARING

(Filed March 11, 1968)

Before Weick, Chief Judge, Phillips and Celebrezze, Circuit Judges.

Upon consideration, it is Ordered that the petition for rehearing be and hereby is denied.

Entered by order of the Court.

/s/ Carl W. Reuss,
Clerk.

APPENDIX C

[Caption Omitted]

ORDER OF DISTRICT COURT DENYING MOTION TO DISMISS

(Filed July 26, 1966)

At a session of said court, held in the Federal Building in the City of Detroit, Michigan, on July 26, 1966.

Present: The Honorable Fred W. Kaess, United States District Judge.

This action is brought by the Secretary of Labor of the United States under the Labor-Management Reporting and Disclosure Act, 73 Stat. 519 (1959), 29 U.S.C. §§401-531[1] The complaint alleges that defendant violated Section 401-(e) of the Act (29 U.S.C. §481(e)) in the conduct of an election held July 20, 1965, by allowing Myra Wolfgang to run as a candidate for Secretary-Treasurer, despite the fact that she was not qualified to run under the "2 years continuous good standing" requirement as it was applied to disqualify persons similarly situated who were candidates for other offices. The complaint further alleges that the Union permitted the altering of its records so as to conceal the disqualifying facts.

The defendant, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, moves to dismiss the complaint for failure to state a claim for which relief may be granted, for the reason that there has been no exhaustion of Union remedies as required by Section 402(a) of the Act (29 U.S.C. §482(a)). Section 402 provides:

> "(a) A member of a labor organization—
>
> (1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body . . .

[1] Hereinafter referred to simply as "the Act".

> may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 481 of this title (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). . . .
>
> (b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this sub-chapter has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization . . ."

Defendant contends that although the complaining member, Godfrey Franklin, protested his disqualification through all available Union remedies, he never protested the qualifications of Myra Wolfgang, and that, therefore, there has been a failure of a condition precedent to the Secretary's complaint. Defendant relies principally upon *Wirtz v. Local Union No. 125, International Hod Carriers', Building and Common Laborers' Union of America,* 231 F. Supp. 590 (N.D. Ohio 1964), in which the Court, emphasizing that the purpose of the exhaustion of internal remedies requirement was to afford the Union the first opportunity to police its own behavior, held that where a member filed a protest with the Union respecting the validity of a run-off election, the Secretary could not challenge the validity of the original election because internal Union remedies had not been exhausted as to that election.

Defendant also relies upon the recent decision in *Wirtz v. Local Union 6, Hotel, Motel and Club Employees' Union,* 66 Civil No. 626 (July 15, 1966), in which the District Court for the Southern District of New York held that where Union members had protested only that a certain eligibility requirement was too restrictive, the Secretary could not attack the election on the grounds that the Union failed to give adequate and timely notice of the composition of its election districts, that the members' right to vote for the candidate of their choice was interfered with, and that certain offices were filled in a manner other than by election.

This Court is in complete accord with these decisions. However, the instant case involves an entirely different situation. Here, it is the application of the same eligibility requirement to candidates running in the same election, but for different offices, which is in question. The issue to be resolved is whether Godfrey Franklin's protest to the Union that the requirement of "2 years continuous good standing" had been discriminatorily applied to disqualify only him, when he had paid his dues in the same manner as everyone else in the Local, afforded the Union a fair opportunity to investigate and remedy the allegedly improper qualification of Myra Wolfgang. This Court is of the opinion that it did.

While Franklin did not specifically name Myra Wolfgang, nor allege alteration of records, he did, in his appeal to the General President of the International, allege discrimination in the enforcement of the "good standing" requirement.[2] Franklin could not have known for certain which

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[2] In this letter (Plaintiff's Exhibit E) Franklin stated, in paragraphs 3 and 4:

"The conclusion of the Election Committee is clearly erroneous. I have never been advised of any such infraction, nor been suspended, fined, or otherwise disciplined with respect thereto, nor been asked to pay any fee or other penalty as a condition of reinstatement; nor has the Local ever advised you, as would otherwise be its obligation under Article X, Sec. 21 of the International's Constitution, of any suspension of myself; nor has it withheld any per capita from you based upon any alleged cessation or suspension of my membership. Indeed, if Article XII, Sec. 6 of the International Constitution stands applicable, the Local itself is suspended for failure to remit to you fees otherwise alleged owing. *Until now, the Local has consistently accepted my dues and that of others when tendered, has waived the purported construction of this section and its application, and is estopped to assert it now.* My dues book will attest to fully paid dues without suspension at all times, as receipted by Secretary-Treasurer Wolfgang.

"The purported reason for my declared ineligibility is a sham and crude subterfuge. The real reason is that, contrary to the

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other candidates were not qualified, nor could he have known of any alteration of records. All he could protest was what he knew. That is, that, although he paid his dues like everyone else, he was the only one disqualified. Using his broad powers of investigation, after being apprised of discrimination by Franklin, the Secretary determined which other candidates were not qualified, and that certain records had been altered. The Union could also have discovered these things had it chosen to investigate thoroughly. The following statement by the court in *Wirtz v. Local Union 169, International Hod Carriers', Building and Common Laborers' Union of America*, 246 F. Supp. 741 (D.Nev. 1965) is apropos to the present case:

> "The act should receive a practical interpretation governed by common sense and realities. If Congress intended that the union member assert a lawyer-like protest to the Executive Board, covering all the bases by specific averment, and buttressed by evidence of all irregularities in the election, there would be no occasion for an evidentiary investigation by the Secretary. Such an interpretation restricts the Act to a definition of remedies and establishment of jurisdiction in this Court for the vindication of essentially private rights, and de-emphasizes to the point of emasculation the public interest which prompted Congress. . . .
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> "The act should be construed to mean that *the Secretary has*, on complaint of a union member, *the right to investigate all aspects of the contested election and to base a complaint to the Court on every issue which*

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> wishes of Secretary-Treasurer Wolfgang, I accepted nomination for the office of Vice-President in opposition to her favored candidate, *incumbent Vice-President* Furay—*whose own circumstances relative to the alleged dues provisions have, in fact, been no different from my own. This discriminatory abuse of my rights as a member of the Local and International violates the provisions of the Labor Management Reporting and Disclosure Act of 1959*, including Sections 401(c), 401(e) and 609, and the Constitution and by-laws of the International and Local, respectively." (Emphasis supplied.)

the defendant union had a fair opportunity to consider and resolve in connection with any member's appeal to the General Executive Board of the union. The Secretary should not be limited to the ground asserted by the one member who complained to the Secretary. Such an approach will preserve the union's first right to correct its own procedures and will help to avoid the intolerable situation which will result if the union is permitted to treat the separate complaint of each appealing member as an isolated 'case' filed for vindication of the personal rights of the member and without regard for the public interest asserted by the Labor-Management Reporting and Disclosure Act of 1959."[3] (Emphasis supplied.)

Assuming the well-pleaded allegations of the complaint to be true, as must be done on a motion to dismiss,[4] the eligibility requirements were unfairly applied and the records tampered with, to make Myra Wolfgang eligible and Godfrey Franklin ineligible. Clearly, the court should hear the evidence and then determine whether the validity of the elections of all or some of the officers were impaired.[5] As was stated by the Court in *Wirtz v. Local 191, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,* 226 F. Supp. 179 (D. Conn. 1964):

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[3] The Secretary's function under Title IV of the Act is analogous to that of the General Counsel of the National Labor Relations Board in relation to charges of unfair labor practices under the Taft-Hartley Act. Once a charge has been made, the N.L.R.B. investigation and complaint are not confined to the specific details of the charges but may extend to related matters of the same class of violations charged. *N.L.R.B. v. Fant Milling Co.,* 360 U.S. 301 (1959); *N.L.R.B. v. Lasko Metal Products,* Civil No. 16520 (6th Cir., July 7, 1966). 29 U.S.C. §160(b).

[4] *Clark v. Uebersee Finanz-Korporation, A.G.,* 332 U.S. 480 (1947); *Wilhide v. Keystone Ins. Co.,* 195 F. Supp. 659 (M.D. Pa. 1961); 2 Moore, Federal Practice, ¶12.08 p. 2244 (2d ed. 1964).

[5] If at the conclusion of the proofs the evidence shows otherwise, an appropriate motion may be made.

"The Court is not bound to confine itself just to the one person who processed the thing; nor is the Court compelled to set aside the entire election. It is a matter of judging the thing on the evidence and deciding whether this invalidity or violation did have a damaging effect on the election of other officers beside the one with which we are particularly concerned."

Defendant further contends that the action was not timely filed. Section 402(b) of the Act (29 USC §482(b)) provides that, after the Secretary finds probable cause to believe that election violations have occurred and have not been remedied, he shall "within sixty days after the filing of [the member's] complaint" institute a civil action to set aside the election. However, in *Wirtz v. Local Union 611, International Hod Carriers' Building and Common Laborers' Union of America*, 229 F. Supp. 230 (D. Conn. 1964), consideration was given to the factors inhibiting the Secretary from commencing the action within the set period, and in *Wirtz v. Great Lakes District Local No. 47, International Organization of Masters, Mates & Pilots*, 240 F. Supp. 859 (N.D. Ohio 1965), it was held that where the Union refused to produce certain records until after court action, the period of the Union-caused delay was not to be counted.

The Secretary alleges, and defendant does not deny, that the defendant refused to produce records until court action was taken, thus causing a 35-day delay. With the addition of this 35 days to the 60-day period, the action was timely filed.

Defendant's remaining grounds for dismissal have been neither briefed nor argued orally, and appear to be without merit.

It Is Ordered, therefore, that defendant's motion to dismiss is denied.

Fred W. Kaess,
United States District Judge.

APPENDIX D

[Caption Omitted]

ORDER OF DISTRICT COURT GRANTING DEFENDANT'S MOTION TO DISMISS AND VACATING ORDER OF JULY 26, 1966

At a session of said Court held in the Federal Building at Detroit, Michigan, this 23rd day of December, 1966.

Present: Honorable Fred W. Kaess, District Judge.

This court having issued, on July 26, 1966, an order denying defendant's motion to dismiss the complaint for failure to state a claim for which relief can be granted,

The matter having come before the court on defendant's motion for a rehearing; and

The court having reconsidered the matter in the light of the decision in *Wirtz v. Local Nos. 9, 9-A, 9-B, International Union of Operating Engineers,* 366 F. 2d 911 (10th Cir. 1966);

It Is Ordered that the order of July 26, 1966, is vacated and that the defendant's motion to dismiss the complaint is granted.

Fred W. Kaess,
District Judge.

APPENDIX E

STATUTE INVOLVED

Section 402 of the LMRDA, 29 U.S.C. 482, provides in relevant part as follows:

> Sec. 402(a). A member of a labor organization—
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> (1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or
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> (2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation,
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> may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 401 * * *.
>
> (b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this title has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, * * *.
>
> (c) If, upon a preponderance of the evidence after a trial upon the merits, the court finds—
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> (1) that an election has not been held within the time prescribed by section 401, or
>
> (2) that the violation of section 401 may have affected the outcome of an election,

the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization. The Secretary shall promptly certify to the court the names of the persons elected, and the court shall thereupon enter a decree declaring such persons to be the officers of the labor organization. * * *